

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of Rules and
Regulations Implementing the
Telephone Consumer Protection
Act of 1991

CG Docket No. 02-278

**SUPPLEMENTAL REPLY COMMENTS OF ROBERT BIGGERSTAFF TO THE REPLY
COMMENTS OF YOUMAIL, INC.**

Robert Biggerstaff hereby submits these supplemental reply comments to the Reply Comments of YouMail, Inc.¹

I do not subscribe to the concept of “strange bedfellows” articulated by YouMail. Reasoned and authoritative conclusions derive value not by virtue of the identity of the speaker or the number of the bedfellows, but from their intrinsic logic. Merit is not weighed by stuffing ballot boxes.

YouMail applies a great deal of selective spin in citing my comments. In discussing YouMail’s own descriptions of its service, I noted that it “YouMail’s role *appears, at present*, to be more akin to a conduit (albeit a dynamic and active conduit rather than passive one) than a party to the message.” I correctly noted that the Commission’s guidance regarding conduits would militate against liability of YouMail, but that this opinion was “*based solely on the current information set out in the representations of YouMail in the Petition.*”

What was not presented in the Petition, was the fact that 1) the contents of the *text message* were authored solely by YouMail, and 2) YouMail was injecting advertising into

¹ *Reply Comments of YouMail, Inc.*, Aug. 9, 2013.

the message stream by use of an advertising laced landing page² that the text message directs the text-message recipient to. This takes YouMail out of the role of a conduit, and places them squarely into the role of participant and author of content.

Automatically sending a text message to a number in Alex's phone book, written entirely by Alex, at the request of Alex, that reads "Hi, this is Alex, I will respond to your voice mail ASAP" is one thing. That was the understanding of YouMail's operations I gleaned from the text of YouMail's Petition.

Capturing CallerID and automatically sending a message that says "RE: Your voicemail for Alex (949•XXX•XXXX) Click for more: <http://ymvm.it/sLZtdLYq>" and then putting advertising on the landing page "<http://ymvm.it/sLZtdLYq>" is something else. That is not the message entered by Alex. That web page is content authored by YouMail.

YouMail's model is one that hijacks and inserts itself into an otherwise person-to-person communications channel. Imagine if I called and left a voice mail for you, and after I finished the message, my phone company jumped on the line and added a 10 second advertisement to the end of the voice mail message I just left.

The theme underpinning the Commission's guidance (in not just the TCPA, but in other contexts such as dial-a-porn) is that when passive carriers are used to carry communications authored by others, such carriers are—without more—not generally liable for the violations of their customers. There are well-known exceptions to this rule, not because they alter the rule *per se*, but because actions of an otherwise passive carrier bring it outside the realm of mere carriage of a message.

² One of the basic precepts of SPAM e-mail is the use of e-mails with nothing more than a link to a landing page with advertising, in hopes of claiming the email itself was somehow not "advertising" because the actual ads were "one-click removed" from the message itself.

What would happen if you receive a call from an AT&T customer but when you answered the phone, there was a 10 second prerecorded ad for AT&T before you got to speak to the caller?³ AT&T's common carrier status would not exculpate it from such actions.

My comments used an analogy (which YouMail cited approvingly) that a person "initiates" a telegram by dictating it to a Western Union clerk—not by tapping out Morse code on the key.⁴ The point of that analogy is to show that it is not Western Union, nor the clerk pressing the code key, that "initiates" the telegram, but rather the person dictating it. But if the clerk (or Western Union) adds their own message as an addendum to the telegram, the clerk (or Western Union as the case may be) certainly does "initiate" the content that is in excess of that dictated by the person who dictated the initial message.⁵

YouMail uses the analogy of "the call recording feature on a VoIP system might be available to all users, [but] it is the customer that has ultimate control over the feature and must use it with the understanding that it must comply with call recording laws."⁶ There are at least two flaws with this analogy.

³ Such a paradigm has already been implemented by various services such as YouTube, to monetize the content created by others. Many YouTube videos are now automatically prefaced by an advertisement that is created and prepended to the video by YouTube itself, and not by the author of the video.

⁴ *Biggerstaff Comments* at 6.

⁵ Some particular alterations of telegrams by intermediaries are quite famous. See R. A. Haldane, *The Hidden World*, New York: St. Martin's Press, 1976 (recounting the story of a WWI spy caught when a suspicious telegram censor changes a telegram from reading "Father is dead" to "Father is deceased", thereby disrupting the code and eliciting a response "Is father dead or deceased?")

⁶ *YouMail Reply Comments* at 12.

First, YouMail turns the “feature” on by default. Therefore YouMail is responsible for that act.

Second, and more importantly, the YouMail system is one that adds content to the message that is not in the control of the user. To use the analogy of a VOIP recording feature, it is as if the provider plays a prerecorded solicitation message at the start of each call when VOIP recording feature is enabled.

YouMail’s analogy to “feature-rich services” from telephone companies fails. The call return function only places a call after human intervention—the user enters *69 on their phone. Human intervention is the test initially recognized by Congress, noting that autodialed calls are permissible if they “include live operator intervention.”⁷

Companies like YouMail who want to be treated like a passive conduit, have to refrain from the activities inconsistent with the role of a passive conduit. Users of an ATDS must implement actual human intervention to make calls, rather than use an automated system—including one that automatically places calls in response to an incoming call by capturing CallerID.

Respectfully submitted, this the 12th day of August, 2013.

/s/ Robert Biggerstaff

⁷ H.R. Rep. No. 633, 101st Cong., 2nd Sess. (1990).